Chong Miaw Lee v Chong Khim Choi

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–63 OF 2003–III– (I)
CLEMENT SKINNER J
17 MARCH 2004

Land Law — Restraint on dealings — Caveat — Application for removal of private caveat — Caveatable interest — Serious questions to be tried — Whether exists — Balance of justice — Whether in favour of defendant — Whether proceedings commenced timeously

The defendant, who claimed to be the registered proprietor of a parcel of land, lodged a caveat against the said land. The plaintiff, commenced this action on behalf of himself and all the other registered co-proprietors of all that parcel of lands, to remove the said caveat. The land was passed to them by their grandfather. Prior to July 2000, the plaintiffs obtained permission from the Land and Survey Department to sub-divide their said land, after which they engaged a private surveyor to submit a proper plan of the sub-division for final approval, which was done. In 2000 the Land and Survey Department requested the plaintiffs to surrender the document of title to their land so that individual documents of title could be issued to the sub-divided lots and it was at this stage that the plaintiffs were informed of the defendant's caveat.

The plaintiffs applied to remove the defendant's caveat on the following grounds: (i) it was defective as the caveat discloses no caveatable interest; (ii) the defendant's affidavit did not disclose any serious question to be tried; and (iii) there has been delay on the part of the defendant in prosecuting his alleged interest in the 1.9550 hectares included in the plaintiffs' land.

Held, allowing the application with costs:

(1) The defendant had a caveatable interest on the parcel of land. The defendant claimed that when the application for the subdivision is completed, it would include the land which belonged to him, ie Grant 266. He claimed that document of title to Grant 266 remained on the register. There was no evidence to suggest that the document title to Grant 266 had been cancelled or extinguished from the register. Therefore, there was no doubt that plaintiffs' land overlapped the defendant's land. The defendant also had a caveatable interest pursuant to s 173(a) of the Sarawak Land Code as his interest fell within the ambit of a trust (express or implied) (see paras 23, 24 and 26).

(2) There was a serious question to be tried in determining whether the defendant's proprietary rights in the 1.9550 hectares of land comprising Grant 266, which had apparently become part of Grant 245, had been extinguished (see para 29).

A (3) The balance of justice did not tilt in favour of the defendant. The defendant should have been aware that although he could have sought the assistance of the Director of Land and Survey to resolve the issue pertaining to his land becoming part of Grant 245, the director nor the registrar moved in his direction. There was also no evidence to show
B that the Registrar had exercised or was going to exercise his power under s 136 of the Sarawak Land Code to rectify the register. Therefore it was more questionable why the defendant had not brought any proceedings against the parties to protect his claim to the 1.9550 hectares since he held the document of title to Grant 266 (see para 37).

C (4) In substance, the effect of a caveat lodged over land has been likened to that of an injunction and therefore constitutes a serious fetter on a registered proprietor's right to exercise proprietary rights over his land. A caveator must not only show that his caveat raised a serious question to be tried, but also that proceedings had been brought and prosecuted timeously by him. The defendant had failed to do so here (see para 39).
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[Bahasa Malaysia summary

Defendan, yang menyatakan bahawa beliau adalah tuan punya tanah yang berdaftar, telah memasuki kaveat persendirian ke atas tanah berkenaan.
E Plaintif telah memulakan tindakan ini bagi dirinya sendiri dan juga pemilik-pemilik berkenaan tanah berdaftar tersebut untuk membatalkan kaveat tersebut. Datuk mereka memberikan tanah berkenaan kepada mereka. Sebelum Julai 2000, plaintif-plaintif mendapatkan kebenaran daripada Jabatan Tanah dan Tinjauan untuk memecah bahagi tanah berkenaan.
F Selepas itu, mereka mengupah seorang jurukur peribadi untuk mengemukakan plan pecah bahagi yang sesuai untuk mendapatkan kelulusan terakhir yang seterusnya didapati. Pada tahun 2000, Jabatan Tanah dan Tinjauan meminta plaintif-plaintif menyerahkan dokumen hakmilik supaya dokumen hakmilik persendirian boleh dikeluarkan
G terhadap lot yang dipecah bahagi dan pada masa inilah plaintif-plaintif dimaklumkan mengenai kaveat defendan.

Plaintif-plaintif memohon supaya kaveat defendan dibatalkan atas alasan berikut: (1) kaveat tersebut adalah cacat kerana tidak mendedahkan kepentingan hak ke atas tanah tersebut yang boleh dikaveatkan; (2) affidavit
H defendan tidak mengemukakan persoalan serius untuk dibicarakan; dan (3) defendan lewat mendakwa haknya yang dikatakan dalam 1.9550 hektar tersebut termasuk tanah plaintif.

Diputuskan, membenarkan permohonan dengan kos:

(1) Defendan mempunyai kepentingan yang boleh dikaveatkan di atas tanah tersebut. Defendan menuntut bahawa apabila permohonan untuk pecah bahagi diselesaikan, ia akan termasuk tanah yang dimiliki

olehnya iaitu Geran 266. Beliau mengatakan bahawa dokumen hakmilik Geran 266 masih dalam buku pendaftaran. Tiada keterangan yang menunjukkan bahawa dokumen hakmilik Geran 266 telah dibatalkan dari buku pendaftaran. Oleh itu, didapati bahawa tanah plaintif dan tanah defendan bertindihan. Defendan juga mempunyai kepentingan hak yang boleh dikaveatkan menurut s 173(a) Kanun Tanah Sarawak oleh kerana hak beliau berada dalam lingkungan yang berunsurkan amanah (nyata atau tersirat) (lihat perenggan 23, 24 dan 26).

(2) Terdapat persoalan serius untuk dibicarakan dalam menentukan sama ada hak defendan sebagai tuan punya tanah terhadap tanah yang berukuran 1.9550 hektar yang terdiri daripada Geran 266 yang telah menjadi sebahagian Geran 245, telah dibatalkan (lihat perenggan 29).

(3) Imbangan keadilan tidak menyebelahi defendan. Defendan harus menyedari bahawa walaupun beliau boleh meminta pertolongan daripada Pengarah Tanah dan Tinjauan untuk menyelesaikan isu tanah beliau menjadi sebahagian daripada Geran 245, tetapi Pengarah atau Pendaftar tidak mengikut arah beliau. Juga, tiada keterangan yang menunjukkan bahawa Pendaftar telah mengunakan kuasa beliau atau akan mengunakan kuasanya di bawah s 136 Kanun Tanah Sarawak untuk membetulkan buku pendaftaran. Oleh itu, boleh disoalkan mengapa defendan tidak memulakan prosiding terhadap mereka untuk memelihara tunututan beliau ke atas tanah yang berukuran 1.9550 hektar kerana beliau memegang dokumen hakmilik untuk Geran 266 (lihat perenggan 37).

(4) Pada amnya, kesan suatu kaveat terhadap sebidang tanah yang telah dikaveatkan disamakan dengan injunksi, dan oleh yang demikian ia adalah belenggu yang serius kepada seorang pemilik tanah yang berdaftar untuk menggunakan hak beliau ke atas tanah sendiri. Seseorang kaveator bukan sahaja harus menunjukkan bahawa terdapat persoalan yang serius untuk dibicarakan, tetapi juga bahawa prosiding telah dimulakan olehnya dan dia bertindak pada waktunya. Dalam kes ini, defendan gagal berbuat demikian (lihat perenggan 39).]

Notes

For cases on private caveats, see 8(2) *Mallal's Digest* (4th Ed 2001 Reissue) paras 3316-3317.

For removal of the caveat, see 8 *Halsbury's Laws of Malaysia*, paras [150.230].

Cases referred to

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)

Law Pik Tai v Wong Nyiik Foon [2002] 4 CLJ 486 (refd)

Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay [1997] 3 MLJ 323 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (folld)

Legislation referred to

Forests Ordinance Sarawak s 65B
Sarawak Land Code ss 136, (1), (2), (3), 173, (a), 174, (i), 203, 204, 205
Chong Chen Jieng (Chong Brothers Advocates), for the plaintiff.
Chan Kay Heng (Chan & Chan Advocates) for the defendants.

Clement Skinner J:

[1] This is the hearing of an application to remove a caveat, lodged by one Chong Khim Choi ('the defendant') who claims to be the registered proprietor of a parcel of land held under Kuching Grant Serial No 266 ('Grant 266'). The caveat was lodged against a parcel of land held under Kuching Grant 245 measuring some 17.40 hectares, the co-proprietors of which are several in number. It is for this reason that the person who applied to remove the caveat, one Chong Miaw Lee, sues on behalf of himself and all the other registered co-proprietors of Kuching Grant 245 except Liew Siew Khim who has passed away. I shall hereafter refer to Chong Miaw Lee and the other co-proprietors as 'the plaintiffs' and to Kuching Grant 245 as 'the plaintiffs' land'. Chong Miaw Lee who represents the plaintiffs is a cousin of Chong Khim Choi, the defendant.

[2] The grounds upon which the defendant caveated the plaintiffs' land are set out in his statutory declaration, affirmed on 13 March 2000 in support of his caveat. This is what he said:

(1) I am the registered proprietor of all that parcel of land situated at Sungai Tapang, Kuching, containing an area of 1.9550 hectares, more or less, and comprised in Kuching Grant Serial No 266.

(2) I verily believe that the area of Kuching Grant Serial No 245 overlaps my land and my search of the Kuching Land Office indicates that Kuching Grant Serial No 245 overlaps Kuching Grant Serial No 266 as indicated in the cadastral plan annexed herewith and shaded pink.

(3) It has recently come to my knowledge that the registered proprietor of Kuching Grant Serial No 245 has submitted a planning proposal to the Kuching Land Office under TP/I-KDC/198/97 and that the subdivision has now been approved. As the approved planning proposal also included my land I verily believe that following the Memorandum of Surrender and alienation my land will be wrongly alienated by the Land and Survey Department to someone else.

[3] The facts show that some time prior to July 2000, the plaintiffs obtained permission from the Land and Survey Department to sub-divide their said land, after which they engaged a private surveyor to submit a proper plan of the sub-division for final approval, which was done. In the year 2000 the Land and Survey Department requested the plaintiffs to surrender the document of title to their land so that individual documents of title could be issued to the sub-divided lots and it was at this stage that

the defendant's caveat came to light when the plaintiffs were informed of it by the Land and Survey Department. A

[4] The plaintiffs have applied to remove the defendant's caveat on the following grounds:

(a) it is defective as the caveat discloses no caveatable interest; B

(b) the defendant's affidavit does not disclose any serious issue to be tried; and

(c) there has been delay on the part of the defendant in prosecuting his alleged interest in the 1.9550 hectares included in the plaintiffs' land. C

[5] In resisting the plaintiffs' application herein, the defendant affirmed an affidavit in which he set out the history behind the plaintiffs' land and his land, and why he claims the plaintiffs' land overlaps his land. I should mention here that the 1.9550 hectares claimed by the defendant is a 'wedge' shaped piece of land.

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[6] The history of these two lands goes back to at least 1938. As I said earlier, the nominal plaintiff here and the defendant are cousins. The nominal plaintiff is the son of Chong Fatt while the defendant is the son child respectively of Chong Soon Siong (hereafter 'the grandfather'). At one point in time, the grandfather owned both Grant 245 and Grant 266 which lands are situated adjacent to each other. E

[7] According to the defendant, sometime in 1939 the grandfather applied to the Land Office to amalgamate both parcels of land into a single parcel. An examination of the document of title to the plaintiffs' land ie Grant 245 shows that originally, the area of land comprised in the grant was '27a 3r 7p'. That measurement has been cancelled and the figure '43 Acs' was written in on the title. The '43 Acs' seems to have been subsequently cancelled and the measurement converted from acres to hectares so that the figures '17.40 hectares' and an accompanying date '26 June 1939' appeared on the document of title. The initials of a person accompanies the cancellation of the figures '37a 3r 7p' while the cancellation of the figure '43 Acs' and the insertion of the figures '17.40 hectares' is accompanied by a signature and the chop 'Asst Registrar'. On the reverse side to Grant 245 two diagrams of the land appear. One diagram is of a regular shaped piece of land measuring 37A 3R 7P, which has the words 'Cancelled' boldly written over it. The second diagram is of a larger piece of land with the figures '43 Acs' crossed out and the figures '17.40 hectares' written in accompanied by a signature and the chop 'Asst Registrar'. The shape of this larger diagram shows that the land it describes no longer enjoys a straight western boundary which it formerly did - now its western boundary is wedge shaped. F G H

[8] The defendant has exhibited a copy of the document of title to Grant 266. It does not require a trained eye to see that when the larger diagram found on Grant 245 is transposed over the diagram found on Grant 266, it is very apparent that the area of wedge shaped land comprised in Grant 266 I

A falls within the boundary of Grant 245 and forms its western boundary. This is in fact confirmed in exhibit 'CML2' of Chong Miaw Lee's affidavit affirmed on 5 March 2003, because the survey points which form the western boundary of Grant 266 ie Survey Points 510, 513 and 240 also forms the western boundary of the plaintiffs' land in Grant 245. These B survey points also appear on the survey plan of the defendant's land exhibited as 'T' to Chong Khim Choi's affidavit of 23 June 2003.

[9] The purpose behind describing what is reflected on the document of title to Grant 245 ie the plaintiffs' land is that there is prima facie evidence to show that the two parcels of land comprised in Grant 245 and Grant 266 were amalgamated into a single parcel held under Grant 245. C

[10] However, the defendant claims that the amalgamation exercise was not completed for various legal reasons put forward by him. This is what the defendant said about the matter in his affidavit affirmed on 23 June 2003:

> 8 I am advised by my solicitors and the Land Officers that the endorsement on D the title to Grant Serial No 245 do not indicate that amalgamation of the two (2) parcels of land was completed because:
>
> (1) the person who did the endorsement did not apply his official stamp;
>
> (2) no Instrument Number was assigned for the act of amalgamation or amendment of land sketch and indicated on the title (whereas the Assistant E Registrar endorsed the conversion of area of 43 acres to 17.4 hectares, in the metric conversion exercise);
>
> (3) if amalgamation was completed, title to Grant Serial No 266 ought to be surrendered to the Land Office for cancellation and the Land Register would be endorsed with such a cancellation whereas the landowner was not directed to surrender his land title and it remained in his possession;
>
> F (4) if amalgamation was completed, the title to Grant Serial No 245 would be cancelled and replaced by a new title showing the enlarged area, and there would be a record of such a significant amendment of particulars of title vide an Instrument Number duly dated and signed by the Land Registrar.
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> 9 I believe that my grandfather might have decided not to proceed with the G amalgamation or he might have thought that the amalgamation was completed at that stage. In any case, he remained in possession of the document of title to Grant Serial No 266 until 1951 when he transferred the land to my father.

[11] The defendant then gave a lengthy explanation in his affidavit about how Grant 266 came to be transferred to his father ie Chong Thiam in 1951 H and subsequently from his father to him in 1995. In short, the defendant claims that the grandfather owed to third parties a sum of RM478.38 which the family members agreed at a meeting, allegedly held in 1945, that his father (Chong Thiam) should settle, in return for which his father would get 'the big house' which was a family reference to the grandfather's residence which was built on five acres of land comprised in Grant 266. According to I the defendant, his father did settle the grandfather's debt and in 1951 Grant 266 was transferred to his father Chong Thiam who subsequently on 23 May 1995 transferred the land to the defendant for love and affection. The

defendant claims that he has been using his land since 1978 to plant vegetables for sale without challenge or hindrance from anyone. A

[12] The defendant says that sometime in 1998 several persons came onto his land with surveying equipment. On his enquiring from them the reason, the defendant was informed that the neighbouring landowners of Grant 245 were sub-dividing their land. The defendant must have been shown the plaintiffs' land title and land map by the survey team because he says in para 19 of his affidavit of 23 June 2003 that 'going by their land title and land map, my land is actually within the land owned by them'. B

[13] The defendant then consulted a lawyer and a surveyor after which he says 'we' made searches and enquiries at the Land Office, as a result of which he was shown the plaintiffs' sub-division plan which clearly indicated that the area of land comprised in the plaintiffs' Grant 245 overlapped his land. According to the defendant, he also learnt that if the sub-division of the plaintiffs' land proceeded to its conclusion, his land will become part of the sub-divided lots issued with new titles. C D

[14] As the defendant regarded Grant 266 as still remaining on the Land Register, his then solicitors prepared a letter which he signed and sent to the Director of Land and Survey. In this letter dated 30 November 1998 (produced as exh E to his affidavit of 23 June 2003) the defendant: E

(a) expressed great concern and anguish that his land had been alienated to 'unknown persons' by the Kuching Office of the Land and Survey Department; and

(b) the sub-division plans submitted by these unknown persons had been approved. F

[15] The defendant ended his letter by saying:

> As you can see from the latest copy of *Extract Title*, I am the registered proprietor of the above property. Under the land registration system in Sarawak Land Code, the Government guarantees my land title. If your Divisional Office has carelessly alienated to some other persons (*sic*) may be it is still not too late to redress the mistake. Should your Department fails (*sic*) to take any action within 30 days, I shall have to seek legal action to recover my property. G

[16] I pause here to make a few observations about the defendant's letter of 30 November 1998 to the Director of Land and Survey. First, it was drafted by his then solicitors and so was written on legal advice. Second, it acknowledges that his land had been 'alienated' to the plaintiffs. Third, he was aware that approval had been given for the sub-division of the plaintiffs' land, the plans of which indicated that his land was included in the plaintiffs' title. Fourth, he still claimed to be the registered proprietor of his parcel of land. Fifth, he blamed of the Land Office for carelessly 'alienating' his land to the plaintiffs and sixthly, he threatened to bring legal action to recover his property if the Director of Land and Survey failed to act within H I

A 30 days of his letter. I will say more about the defendant's awareness of what the status of his land was in 1998 in a later part of this decision.

[17] After the defendant sent his letter of 30 November 1998 to the Director of Land and Survey, some correspondence was exchanged between the Director and the defendant but he has not exhibited any of the B Director's letters in these proceedings. Instead he has only produced copies of his own letters or letters written on his behalf to the Director, namely, a letter dated 15 January 1999 written by his then solicitors forwarding to the Director a photocopy of his title deed, extract of title, and a copy of a cadastral plan; another letter dated 24 March 2000 requesting the Director C to put on hold the sub-division process and to sort out the problem by having 'Grant Serial No 266 mutated from Grant Serial No 245'; another letter dated 2 April 2001 from his then solicitors requesting for a reply to their letter of 24 March 2000 as it "... has been a year since our letter"; and a letter dated 12 June 2003 from his surveyors forwarding survey plans to the Director.

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[18] Relying on the above facts, the defendant says his caveat should not be removed because:

1 he still holds the document of title to Grant 266 which he has not been directed to surrender for cancellation or extinguishment, and even as E recently as 23 May 1995 the Land Office dealt with his document of title when his land was transferred from his father to him;

2 his caveat was lodged to protect his proprietary and caveatable interest in that area of 1.9550 hectares contained in Grant 266 which has 'been grafted onto the plaintiffs' land';

F 3 there are serious issues to be determined, namely, can the defendant's proprietary rights in Grant 266 be extinguished by the 'artificial grafting' of his land onto the plaintiffs' land by an act of amending the plaintiffs' title?;

G 4 he is not guilty of delay in pursuing his claim as he has requested the Director of Land and Survey to investigate and confirm his ownership of Grant 266. According to the defendant, the Registrar has the right to rectify any title under s 136 of the Sarawak Land Code. The defendant says that until the Department of Land and Survey or the Registrar has rendered its decision, the status quo should be maintained by allowing H his caveat to remain.

[19] In determining whether the defendant's caveat should remain or be removed, counsel for the plaintiffs urged me to follow the approach which the Court of Appeal set out for the courts in West Malaysia to follow in the case *of Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 I MLJ 719, when they hear an application for the removal of a caveat lodged against land situated in West Malaysia under the corresponding provisions of the National Land Code to s 173(a) of the Sarawak Land Code.

[20] In *Luggage Distributors* the Court of Appeal laid down a three-stage test which a court should go through when evaluating whether a caveat ought to be removed or allowed to remain on land. The three-stage test was expressed in these terms: A

> ... The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further B
>
> ...
>
> The matter does not come to an end once the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case. C D
>
> ...
>
> The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* [[1979] 2 MLJ 212] as 'the balance of convenience'. As to the matters that go to determine in which direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong* that mere repetition becomes unnecessary. E

[21] Although in *Luggage Distributors* the Court of Appeal was speaking in the context of an application for the removal of a caveat under the provisions of the National Land Code when it laid down the three-stage test, in my judgment the same test may be applied by the court here when considering an application for removal of a caveat under the provisions of the Sarawak Land Code, but always keeping in mind the requirements of s 173 of the Sarawak Land Code. In *Law Pik Tai v Wong Nyiik Foon* [2002] 4 CLJ 486, I gave my reasons for saying why the three-stage test laid down in *Luggage Distributors* should be followed by the courts in Sarawak and no purpose would be served by repeating them here. F G

[22] Adopting the approach laid down in *Luggage Distributors,* I will first consider whether the grounds stated in the defendant's application for the caveat are sufficient in law to support a caveat. The plaintiffs submitted that it did not because (a) the plan annexed to the caveat was defective as the defendant failed to demarcate the exact area of his wedge shaped land within Grant 245; (b) the defendant's statutory declaration did not disclose a caveatable interest within the meaning of s 173(a) of the Sarawak Land Code; and (c) the defendant's statutory declaration did not comply with the requirements of s 174 (a) of the Sarawak Land Code. H I

A **[23]** I regret I find no merit in the points taken by the plaintiffs in (a), (b) and (c) above and I say so for the following reasons. The defendant's statutory declaration states that the area of land comprised in the plaintiff's Grant 254 overlaps the area of land comprised in his Grant 266 and that if the plaintiffs' application for sub-division is completed, it would include B land which belongs to him.

[24] The defendant's claim of 'overlapping' which is disclosed in his statutory declaration is elaborated on in his affidavits. Therefore, contrary to the contention of the plaintiffs, I am not precluded from considering what is stated in the defendant's affidavits about the 'overlapping' because he has already disclosed it as a ground in his statutory declaration when applying C to lodge his caveat. In his affidavits the defendant exhibited the document of title to Grant 266, which he says remains on the Register. There is no evidence before me to suggest that the document of title to Grant 266 has been cancelled or extinguished or that it has been cancelled from the Register. There is also evidence before me to indicate that the land area D comprised in the plaintiffs' Grant 245 increased in size from 37a 3r 7p to 43 Acres which converts to 17.40 hectares, and when the amended diagram of the plaintiffs' land in Grant 245 is transposed over the diagram of the defendant's wedge shaped land in Grant 266, there can be little doubt that the plaintiffs' land 'overlaps' the defendant's land as the western boundary E of the plaintiffs' land incorporates the defendant's wedge shaped land into its (ie Grant 245's) boundary.

[25] Given the above facts I am satisfied that the grounds stated in the defendant's application for the caveat, namely, his claim to be interested in 1.9550 hectares within that area of land measuring 17.40 hectares F comprised in Grant 245 due to 'overlapping' discloses a caveatable interest, thus passing the first test.

[26] With regard to the plaintiffs' contention that in order for the defendant to show that he has a caveatable interest in Grant 245, his claim or right must fall within one of the four categories mentioned in s 173(a) of G the Sarawak Land Code, ie it arises out of (i) an unregistered agreement; (ii) other instrument; (iii) a trust express or implied; or (iv) a licence under s 65B of the Forest Ordinance Sarawak, it is my view that the defendant's claim or right arises from his being the registered proprietor of Grant 266 which would fall within limb (ii) under s 173(a) ie other instrument.

H **[27]** I also do not agree with the plaintiffs' contention that the defendant has not complied under s 174(i) which requires that he state with sufficient certainty the nature of the estate or interest claimed by him and how it is derived from the proprietor. Here the defendant has stated that he claims an interest in the 1.9550 hectares within the plaintiffs' land because of the 'overlap' and has also explained how that 'overlap' came about.

I

[28] I now proceed to the second stage by asking: based on the affidavits filed by the defendant, does his claim disclose a serious question meriting a trial? A

[29] I am satisfied that it does so. As I have already said, there is ample evidence before the court to show that the amended diagram of the plaintiffs' land which is drawn on the document of title to Grant 245 clearly B includes the defendant's wedge shaped land within its (ie Grant 245's) western boundary, and has increased in size from 37a 3r 7p to 43 acres or 17.40 hectares. The only reasonable explanation for this increase in size is that the area within Grant 266 has become included in Grant 245 ie an amalgamation has taken place. But, the defendant has produced a copy of the document of title to Grant 266 which shows that it has not been C cancelled or extinguished, and, he asserts that the title remains on the Register till today. If that be the case then the serious question that has arisen for determination is this: Has the defendant's proprietary rights in the 1.9550 hectares of land comprised in Grant 266, which have apparently become part of Grant 245, been extinguished?

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[30] The plaintiffs say that the defendant's affidavits disclose no serious issue to be tried because the defendant's assertion that the amalgamation of the two lands was applied for in 1939 is very doubtful because:

(a) the amended diagram found on Grant 245 bears an Instrument No. D3388/18 which represents an instrument registered in the year 1918; E and

(b) the survey plan of Grant 266 made by the defendant's surveyor which is exhibited as 'T' to the defendant's affidavit affirmed on 23 June 2003 shows that Grant 266 cuts into a neighbouring Lot marked 398. The plaintiffs ask: if the defendant's amalgamation theory is correct, why is F it that Grant 266 not only covers part of the plaintiffs' land but also the adjacent Lot 398. I am afraid I cannot see the point being made by the plaintiffs but even if what they say in (a) and (b) above is correct, this would still not detract from the fact that the defendant holds the document of title to Grant 266 and it has not been cancelled or removed from the Register. G

[31] Having found that the defendant has crossed the first two hurdles, I will now proceed to the third stage ie to consider where the balance of justice lies in this case. In doing so I take into account the following facts. At one end of the scale is the plaintiffs who are several in number. They have all over a number of years become co-owners of undivided shares in a large parcel of H land. They have since at least 1998, taken steps to sub-divide their land so that they may each become individual land owners holding a separate document of title for the share they own in the land. In doing so they are exercising their proprietary rights over the land they own and there is no allegation at all of any fraud or other wrongful act on their part in either acquiring ownership of Grant 245 or in seeking to sub-divide the same. Their application for sub-division has been approved and by all accounts is in the final stages of completion, with the Land Office calling for a surrender of

A Grant 245. But the sub-division cannot proceed because of the defendant's caveat.

[32] At the other end of the scale is the defendant who has known from at least 1998 that the land over which he holds a document of title has become a part of his neighbouring land, the co-proprietors of which were actively B taking steps to sub-divide the same including the area of land which he claims to own. The defendant has been able to obtain the history behind the two adjourning lands and also trace how Grant 266 was transferred to his father (who is apparently still alive) before it was transferred to him in 1995, to the extent that he even questions the amalgamation of the two lots. The C facts show that immediately after seeing the plaintiffs' sub-division plans in 1998 and discovering that his land was included in Grant 245, the defendant sought advise from a solicitor and surveyor and then wrote to the Director of Land and Survey, complaining that his land had been alienated to 'unknown persons'. There is no doubt in my mind that the defendant was fully aware of the implications of his land being included within Grant D 245. The letter he wrote to the Director on 30 November 1998 amply demonstrates this. Indeed he even threatened legal action over the matter.

[33] It is also clear to me that the defendant could not have received any satisfactory response from the Director because nothing material or significant seems to have been done by the Director to rectify the matters E complained of by the defendant. It took another one year fours months after writing to the Director on 30 November 1998, before the defendant lodged his caveat on 20 March 2000. Since then until now, the defendant has not brought any legal action against anyone to prosecute his claim to the 1.9550 hectares in respect of which his caveat was lodged.

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[34] What the defendant has done since lodging his caveat on 20 March 2000 is to write to a letter of the Director through his solicitors on 24 March 2000 asking him to sort the problem out by having Grant 266 mutated from Grant 245. The Director obviously ignored the defendant's solicitor's letter of 24 March 2000 because more than a year later on 2 April 2001, the G defendant's solicitors wrote another letter to the Director requesting a reply to their letter of 24 March 2000. The defendant has not exhibited a reply, if there was one, from the Director to his above request. Another two years passed before the defendant forwarded a copy of his survey plan to Grant 266 to the Director through his surveyor on 12 June 2003.

H

[35] In an attempt to tip the scales in his favour and in response to the plaintiffs' submission that the defendant's caveat must be removed as he delayed in taking any steps to prosecute his claim to the 1.9550 hectares, the defendant says it would be wrong to accede to the plaintiffs' assertion as it would encourage the ruthless and unscrupulous to acquire their I neighbour's land by similar casual amendments to their land title. The defendant also says that if his caveat is removed, it would give a wrong indication to the Land and Survey Department that the plaintiffs' amended

document of title is true and accurate without undergoing investigation and proper scrutiny. The defendant also says he cannot be accused of any delay because the proper authority and forum to arbitrate this matter is the Land and Survey Department, as provided by s 136 of the Sarawak Land Code by way of rectification of the Register because:

(a) s 136(1) provides that the Registrar may correct errors or omissions in any document of title, upon evidence as appears to him sufficient;

(b) s 136(2) empowers the Registrar to require the title holder to deliver up the same for the purpose of being cancelled or corrected;

(c) s 136(3) provides that the Registrar may apply to the High Court to issue summons for such person to appear before the court if he refuses or neglects to comply with the Registrar's notice to deliver up the title.

[36] According to the defendant, he has presented his case to the Director of Land and Survey and has followed up with reminders requesting for investigation, including engaging a private licensed surveyor to survey and submit a survey plan and report to the Department. The defendant says that as the Department or Registrar has not rendered its decision, the status quo should be maintained by allowing the caveat to remain. The defendant says that since there is a statutory mode of resolving the matter, the parties are obliged to exhaust this remedy before applying for declaratory orders.

[37] Having considered the position of the parties, I regret that I find the balance of justice does not tilt in favour of the defendant. I say so for the following reasons. Although it was open to the defendant to refer his complaint regarding his land becoming a part of Grant 245, to the Director of Land and Survey to try to resolve the same, it must have become apparent to the defendant from the reminders which he, or his solicitors at that time, had to write to the Director that neither the Director nor the Registrar were moving in the direction that he wanted them to. There is also no evidence before me to suggest that the Registrar has exercised or is going to exercise any of the powers vested in him by s 136 of the Sarawak Land Code to rectify the Register. In this regard, it should not be overlooked that as far as the Registrar is concerned, if the defendant feels aggrieved that the Registrar is refusing to perform any act or duty which he is required or empowered to perform under the Sarawak Land Code, then the defendant can have recourse to the provisions of ss 203, 204 and 205 of the Code to redress the situation. There is therefore absolutely no basis for the defendant's submission that as the Department or Registrar had not rendered its decision, the status quo should be maintained. As matters stand before me, if what has transpired so far between the Director and the defendant is anything to go by, if the status quo is to be maintained until a decision is made by the Department or Registrar, all parties will be waiting for an indefinite period.

[38] By the time this application was filed by the plaintiffs on 6 March 2003, some four years and three months had passed since the defendant first referred his complaint to the Director through his then solicitor's letter

of 30 November 1998. By the time the defendant lodged his caveat, some one year and four months had passed from the date he first wrote to the Director. Surely these long periods of time would have indicated to the defendant that he needed to take some form of legal action to either get the Director or Registrar to act on his complaint under s 136 or any other relevant section of the Sarawak Land Code or he needed to take legal action against the owners of Grant 245 to prosecute and protect his claim to interest in the 1.9550 hectares, yet absolutely nothing was done by the defendant in either direction. Bearing in mind that the defendant holds the document of title to Grant 266 which is still on the Register, it is all the more questionable why the defendant has not brought any proceedings against either to prosecute his claim to the 1.9550 hectares, a *fortiori* when the defendant relies on very legalistic grounds in his affidavits to maintain that the amalgamation of the two parcels of land was not completed ie no proper endorsement on title by a properly identified official, no Instrument Number assigned to record or reflect amalgamation, no endorsement of cancellation at Land Office, etc. See para 8 of his affidavit of 23 March 2003.

[39] The defendant's failure to bring any form of proceedings against either the Land and Survey Department or the plaintiffs becomes even more inexplicable when viewed in the light of the observations I made in an earlier part of this judgment, namely, that in his very first letter to the Director on 30 November 1998 the defendant had already consulted his then solicitors and surveyor, was aware of and in fact clearly took the stand that his land had been 'alienated' to the plaintiffs. Yet he has not brought any proceedings after lodging his caveat to prosecute his claim to land which he knew had become a part of Grant 245. In the circumstances I find that after lodging his caveat there has been inordinate and inexcusable delay on the part of the defendant in prosecuting his claim to the 1.955 hectares which was the very purpose for lodging the caveat against the plaintiff's land in the first place and which continues to prevent the plaintiffs from exercising their proprietary rights over their land. In substance, the effect which a caveat has over land against which it is lodged has been likened to that of an injunction and therefore constitutes a serious fetter on a registered proprietor's right to exercise proprietary rights over his land. It is for this reason that the courts require that a caveator must not only show that his caveat raises a serious question to be tried, but also that proceedings have been brought and prosecuted timeously by him (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 and *Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay* [1997] 3 MLJ 323 (CA). Unfortunately the defendant has not done so here. Therefore, it lies ill in the mouth of the defendant to complain that if his caveat is removed, it would encourage the ruthless and the unscrupulous and also send a wrong message to the Director of Land and Survey. It was within the defendant's own power to put in check what he complains about, by commencing proceedings timeously to protect his interest but he has failed to do so.

[40] For all the reasons given above I find that the defendant does not pass the third stage of the test. The balance of justice does not lie in favour of maintaining the defendant's caveat over the plaintiffs' land. I accordingly grant the plaintiffs' application and order that the defendant's caveat be removed with costs to the plaintiffs.

Application for removal of caveat allowed with costs.

Reported by Jeyanthi Mala